

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

**STANLEY HERBERT**

Plaintiff

vs.

**MILFORD TOWING & SERVICE,  
INC., et al.**

Defendants

: CASE NO. **C-1-00-855**  
:  
: **MAGISTRATE JUDGE HOGAN**  
:  
:  
: **DEFENDANTS' MOTION FOR LEAVE**  
: **TO ADD THE AFFIRMATIVE**  
: **DEFENSE OF FAILURE TO**  
: **MITIGATE DAMAGES**  
:

Now come the Defendants, by and through counsel, and hereby request this Court leave under Federal Rule of Civil Procedure 15 to plead the affirmative defense of mitigation of damages. A memorandum in support of said motion follows herein.

RESPECTFULLY SUBMITTED,

/S/ Mark J. Byrne

**MARK J. BYRNE - #0029243**

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Attorney for Defendant

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**MEMORANDUM**

In preparation of the case, the Defendants have found that they have failed to plead an affirmative defense of failure to mitigate damages on behalf of the Plaintiff. A review of the Federal Rules of Civil Procedure indicates that such an affirmative defense is not one that is

identified specifically as an affirmative defense. However, there is a catch all provision under the Federal Rules which may require pleading the affirmative defense of failure to mitigate. Thus, Defendants respectfully requests this Court leave to file the same. A proposed Supplemental Answer is attached hereto and incorporated by reference.

RESPECTFULLY SUBMITTED,

/S/ Mark J. Byrne

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 8, 2003, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I also hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

James A. Hunt, Hunt  
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/S/ Mark J. Byrne

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